

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26**

VARSITY SPIRIT FASHIONS & SUPPLIES, INC.¹

Employer

and

Case 26-RC-8201

**FURNITURE WORKERS DIVISION, IUE,
LOCAL 282, AFL-CIO**

Petitioner

DECISION AND ORDER

Upon a petition² duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,³ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.⁴
3. The labor organization involved claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.⁵

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a Request for Review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **September 25, 2000**.

DATED, September 11, 2000, at Memphis, Tennessee.

/S/

Ronald K. Hooks, Regional Director
Region 26, National Labor Relations Board
1407 Union Avenue, Suite 800
Memphis, TN 38104-3627
tel: 901-544-0018

1. The name of the Employer was amended to *Varsity Spirit Fashions & Supplies, Inc.* at the pre-election hearing.

2. Petitioner Union filed a petition on August 2, 2000 requesting certification to represent employees in the following unit;

INCLUDED: All production and maintenance employees, including warehouse clericals.

EXCLUDED: All supervisors, foremen, office clerical employees, watchmen, guards and all others that are normally excluded.

3. The Employer has filed a brief which was duly considered.

By motion received on August 28, 2000, the employer requested that the record be supplemented with an executed lease of a warehouse facility in Bartlett, Tennessee. The Petitioner Union did not respond to said motion. For good cause shown, the employer's motion is granted and the lease is received as a supplemental exhibit. (Employer's Exh. 16)

4. The parties stipulated that Varsity is a Minnesota corporation engaged in the warehousing and distribution of cheerleading and soccer apparel at its facilities in Olive Branch, Mississippi. During the past calendar year, a representative period, Varsity purchased and received products value in excess of \$50,000 directly from outside the state of Mississippi.

5. Varsity has production operations, in Tennessee, that modify (i.e. customize) cheerleading uniforms. Varsity also operates a summer cheerleading camp operation and promotes its cheerleading apparel out of its corporate offices in Memphis, Tennessee.

There are approximately 28 full-time and part-time employees at Olive Branch. Parties agree that, if an election is directed, the appropriate unit should include all regular full-time and part-time warehouse employees that are classified as pullers, packers, order-stockers, warehouse clericals, and shipping & receiving employees. Parties stipulate that excluded supervisors include Jeff Webb, Joe Hart, Tommy Grissom, Chris Long, and Robert Tisdale. Parties further agree that Brenda Blaylock, Lynn Bond, June Moynihan, and Ludella Moore are included in the unit as warehouse clerical employees; and that Anne King and Laura Hamblen are excluded as office clericals. Parties disagree as to the status of Pam Beasley, Marcy Hamblen, Makala Freeman, Tyrone Metcalf, and Marcus Haynes; the voting status of seasonal employees; and, the effect of Varsity's imminent relocation.

Imminent Relocation

Varsity argues that the petition should be dismissed due to the imminent relocation of its warehouse. Varsity maintains that no offers of transfer have been made or accepted by Olive Branch employees. As a result, Varsity asserts that the current complement of employees will not be substantial and representative of the complement at the new facility and an election would not effectuate the purposes of the Act.

Varsity operates its business out of four separate structures. Two of these structures are separate warehouse buildings, in one complex, at Horizon Lakes in Memphis, TN. These structures house Varsity's cheerleading warehouse and production facility. At this location cheerleading apparel is warehoused, material is cut, and cheerleading uniforms customized. Varsity also operates a mail order business and maintains its corporate offices at this facility. Out of its corporate offices, Varsity runs summer cheerleading camps under the name "Universal Cheerleaders Association." The two structures at the Horizon Lakes facility are designated building 30 and building 40. Building 30 houses Lettering Department and Information Technology while Building 40 houses the USA Warehouse, Cutting, Knitting, and Corporate Offices.

Due to a lack of warehouse space, Varsity rented an additional 25,000 feet of Space in the Spring of 1999, at Century Center, across the freeway from its Horizon Lakes facility. This warehouse is shared with a medical supplier. The facility warehouses raw materials such as cloth, summer camp apparel, and Umbro soccer apparel.

Varsity's last structure is the Olive Branch facility, which is an 80,000 square foot warehouse. Varsity moved from Memphis to the current facility in Olive Branch, Mississippi in October 1998. Varsity entered into a two-year lease expiring on October 31, 2000. The expiration of the lease-term was intentionally set to coincide with the expiration of the lease-term for the Horizon Lakes facility, anticipating the consolidation of the two facilities. The Olive Branch warehouse is separated into two product lines that operate independently: Varsity and Umbro. The operation of both lines of apparel consists of picking and packing ordered merchandise. Sales representatives solicit orders and the Olive Branch facility warehouses the goods and fills the orders. The warehouse has a main office isolated from the warehouse by walls.

Varsity's business grew dramatically and over the past two years, due in part to the increased demand for its cheerleading apparel, but largely to the addition of the *Umbro* line. Outgrowing the Olive Branch facility, Varsity compensated for the inadequate warehouse space by bringing mobile storage trailers to the site. During the summer of 2000, Varsity had approximately 27 trailers on the site.

In the fall of 1998 Varsity made an assessment of its warehouse needs, and planned to move from Olive Branch. In the fall of 1999, Varsity entered into negotiations with Brothers Corporation for the leasing of a 270,000 square foot facility, on Appling Drive, in Bartlett, TN. The Brothers Warehouse is 24.5 miles from the Olive Branch warehouse and only a couple of miles from Varsity's Horizon Lakes facility. Varsity found the facility appealing because its size would allow the corporation to consolidate its warehouse and production facilities in one structure.

Brothers sold the warehouse to Belz corporation in the Fall of 1999 and Varsity entered into negotiations with the new ownership. At the date of the hearing, a lease had been fully negotiated for the Appling Drive Warehouse, but not signed. Varsity subsequently supplemented the record with a signed lease, executed on August 22, 2000.

Varsity will move from the Olive Branch facility in late October, with the move being completed by November 1, 2000.

Olive Branch employees have not been offered transfer positions at the new location. Varsity maintains that such offerings are imminent; however, warehouse manager, Joe Hart, expressed doubt that many employees would be willing to commute the additional 24.5 miles to the Appling Drive facility. The total number of the 28 full and part-time employees that do choose to make the commute will be consolidated with the 48 employees now at the Horizon Lakes facility. The Horizon Lake complement consists of 23 full and part-time employees in the Lettering Department, 16 in the USA Warehouse, 7 in Cutting, and 4 in Knitting.

In determining whether a prompt election should be held when a change in the employer's location, and possible changes in the work force, are imminent the Board must balance the objective of insuring maximum employee participation in selecting a bargaining agent against the goal of permitting employees to be represented as quickly as possible. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 48, 107 S.Ct. 2225, 2328 (1987). In striking this balance, it must determine on a case-by-case basis whether the present employment complement is "substantial and representative" of a complement to be employed within the foreseeable future. See *Premium Foods, Inc. v. NLRB*, 709 F.2d 623, 628 (9th Cir. 1983); *NLRB v. Pre-Engineered Bldg. Prods., Inc.*, 603 F.2d 134, 136 & n. 1 (10th Cir. 1979). The composition of the pre-move unit may be altered by the move because some voters may not continue their employment at the new location and there may be new hires who did not vote. But, if the complement at the time of the election is "substantial and representative" of the complement at the post-move location, the election may be treated by the Board as determinative of whether there will be a bargaining representative for the post-move unit.

In *Cooper International Inc.*, 205 NLRB 1057 (1973) the employer planned to move to a new location 18 miles from its current facility. Subsequently, the warehouse employees organized and the union petitioned for certification. The record indicated that the employer would be offering all employees transfer positions; and that the unit was expected to expand from 29 to 43 employees. The Board held that an order directing an election would not be useful where the employer's transfer of operation was imminent and there was no evidence that the employer had offered, and that a considerable proportion of the employees had indicated that they would accept, employment at the new location. The Board, therefore, dismissed the petition without prejudice to the filing of a new petition, supported by an adequate showing of interest, when the new facility was in operation and a substantial and representative work force was employed there.

The Board chose a different route in *NLRB v. AAA Alternator Rebuilders*, 980 F.2d 1395 (11th Cir. 1993). Again, the Board considered the impact of an imminent 18-mile relocation on a certification election. However, the Board granted the election and the employer requested review of the order. On the day of election the Board granted review and impounded the ballots. Six months later the Board ordered the ballots to be opened because the complement at the old location was "substantial and representative"

of that at the new location. The Board relied on the fact that all employees at the old location had been offered jobs at the new facility; that of 65 eligible to vote in the election 43 continued working at the new location; and that as of the date of the order, 63 persons were working in the bargaining unit found appropriate. The employer appealed the Board's decision to the Court of Appeals.

The Eleventh Circuit outlined the Board's "substantial and representative" test, stating that in finding the appropriateness of an election, old and new units must be comparable in similarity of work, wages, working conditions, comparative size, continuation of like functions and similar factors. One way for the Board to address the "substantial and representative" complement issue is to make a projection based upon data that reveals how the pre-move voting complement will be representative of the unit as it will be composed at the new location. In *Cooper* the Board attempted to make such a projection in advance of the election because of time and insufficient data. However, the *AAA* Court illustrated that *Cooper* is but an example of the Board's exercise of discretion. In *AAA*, the Board exercised discretion permitting the election to proceed, sealed the ballots, and determined after the move that those who voted were substantial and representative of the employees in the unit at the new location. The ballots were then opened and a determination was made as to whether a collective bargaining representative had been chosen. In short, it permitted the election subject to conditions subsequent. The Court found the exercise of the Board's discretion appropriate, however, cautioned that discretion such as exercised in *AAA* should only be exercised in appropriate cases. For instance, an election would be inappropriate where the Board has evidence that shows a "substantial and representative" unit will not be present at the new location.

In the case at hand, the facts indicate that an election would be inappropriate. I find that Varsity planned on moving from the Olive Branch facility for over a year. Varsity negotiated for the leasing of a warehouse in Bartlett, Tennessee that was executed on August 22, 2000. The move will be completed by November 1, 2000. The distance alone is not dispositive, but is a factor. It is also noted that no employees have been offered or accepted positions at the new facility. There are additional facts that indicate the new complement would not be substantial and representative of the complement at Olive Branch. Of particular concern is the integration of all Varsity's production employees. As of November 1, 2000, the speculative portion of the 28 full and part-time employees at Olive Branch commuting to the new facility, will be combined with the 48 production employees at Horizon Lakes, including, 16 warehouse employees.

I find it speculative that a substantial number of employees from the Olive Branch facility will accept positions at the new facility in Bartlett. I also find that the unit may change dramatically due to integration of employees from multiple facilities. These factors indicate that the new complement will not be "substantial and representative" of the old complement at Olive Branch. Therefore, an election, even under the wait-and-see approach applied in *AAA* would be inappropriate. Accordingly I am dismissing the petition. Assuming *arguendo* that review is sought of my decision to dismiss the petition and the Board orders an election, the remaining unit issues are resolved as follows.

Seasonality

The parties disagree with respect to the voting eligibility of seasonal employees employed at the Olive Branch facility. Varsity take the position that seasonal employees as a group do not have a reasonable expectancy of continued employment sufficient to warrant their inclusion in the voting unit. Petitioner asserts that the community of interest between the seasonal and permanent employees is sufficient to demand their inclusion in the unit.

At its Olive Branch facility, Varsity employs three types of employees: full-time, part-time, and seasonal. Full-time and part-time employees are employed year round and work the same forty-hour work week. The two classifications are only differentiated by the access to a benefits package by full-time employees. Seasonal employment usually provides a testing ground for year round positions; however, some employees are hired directly to full-time or part-time positions depending upon particular skills. Seasonal employees are hired, on a temporary basis, to handle the seasonal demand for Varsity's cheerleading and soccer apparel. The Varsity cheerleading line runs from April to July and peaks in May and June. The Umbro soccer line runs from May to September and peaks in July and August. These seasons are very consistent year-to-year.

Seasonal Employees are hired by published advertising, word of mouth, and by rehiring former employees. Varsity has also used employees hired through a temporary employment agency. Warehouse Manager, Hart, testified that the company did not maintain a contact list of former employees nor did they call former employees to solicit seasonal help. Hart testified that seasonal employees usually did not return and they were not expected to return. He stated that former employees were welcome to apply for reemployment and the company maintained the work records of its former employees for reference. However, one former employee, Kassandra Barksdale testified that the supervisor over pickers, Chris Long, had called her home about ten times during the late summer and fall of 1999. During these conversation he asked her to come back to work.

To increase response to published ads, Varsity would not specify that it was hiring for seasonal positions; but, Hart testified that all employees were told that their positions were temporary when they interviewed. Charlotte Payne and Kassandra Barksdale testified that they did not remember being told that their jobs were seasonal; and, that it was only after they started work that they were told this by other employees. However, Payne and Barksdale were both former employees and were aware that their 2000 employment was seasonal. Both had worked during the 1999 season and both quit without giving any advanced notice to Varsity. Kassandra Barksdale testified that she had no intention of returning to Varsity when she quit in 1999 and that she only returned because she needed a job at the time. Telisse Raines first worked for Varsity during the 1996 summer season. She testified that management fully explained her position was seasonal during her initial interview and that every season that she worked after that she knew her employment was temporary.

Warehouse manager, Hart, testified that assistant warehouse manager, Tommy Grissom, and supervisor over pickers, Chris Long, decide when to begin layoffs; but layoffs are dictated by diminishing orders that mark the end of a season. Hall, Barksdale, Payne, and Raines all testified that they were given a one week notice and were laid off on August 4, 2000.

Human Resource Director, Robert Tisdale, prepared a list of Varsity's seasonal employees over the past five years. Over this time the use of seasonal employment has expanded significantly. In 1996 there were 4 seasonal employees, 2 of whom returned from 1995. In 1997 there were 13 seasonal employees, 2 of whom were returnees, and 2 who were retained after the season ("carry-overs"). In 1998 there were 27 seasonal employees with 2 returnees and 3 carry-overs. In 1999 there were 52 seasonal employees with 3 returnees and 7 carry-overs. In 2000 there were at least 51 seasonal employees with 5 returnees. There are also 12 employees that are yet to be laid off, though three were scheduled to be laid off on August 18.

Regular seasonal employees have a reasonable expectation of reemployment in the foreseeable future and are included in the bargaining unit. *L & B Cooling*, 267 NLRB 1 (1983); *California Vegetable Concentrate*, 137 NLRB 1779 (1962); *Knapp-Sherrill Co.*, 263 NLRB 396, fn. 2 (1982). Temporary or casual seasonal employees, who have no such expectation, are excluded. *L & B Cooling*, supra; *Post Houses*, 161 NLRB 1159, 1172-1173 (1966); *Root Dry Goods Co.*, 126 NLRB 953, fn.10 (1960); *F.W. Woolworth Co.*, 119 NLRB 480 (1957). The Board considers each case individually and have considered any number of factors in determining whether seasonal employees share a community of interest to warrant their inclusion in the voting unit.

In *California Vegetable*, supra, the employer used seasonal employees for its vegetable processing. The Board found that the employee had an expectation of reemployment and a community of interest with the permanent employees. Factors the Board considered were common supervision, duties, and salary. The employer in that case did not maintain a recall list, but did give former employees preference. Additionally, between 20 and 50 seasonal employees become permanent each year. However, the key factor in the Board reversing its earlier decision was the number of returning employees with over 50 percent having worked in the previous season. The Board noted that the returning employees were substantial in number and resulted in a stabilized demand for, and dependence on, the returning seasonal employees.

The issue of whether 14 seasonal employees were eligible voters was addressed in *Seneca Foods Corporation*, 248 NLRB 1119 (1980). In that case, the seasonal employees shared common interests with the permanent employees with respect to job duties and there was evidence that some employees may have been misled as to the duration of their employment. However, only three of the 72 seasonal employees during the petition year were seasonal employees the prior year. The employer did not maintain a recall list or give hiring preferences. The Board found the seasonal employees to be ineligible because there was not enough regular seasonal employment or chance of becoming permanent to give them a sufficient community of interest with the permanent employees.

The above cases offer clear guidance for the case at hand. There are a number of factors that suggest a community of interest between Varsity's seasonal and permanent employees. Varsity is highly dependent on seasonal labor and has become more so over the past three years. The seasonal employees have common supervision, duties, and salary as the permanent employees. Varsity does not maintain a recall list, but does give former employees preference. Despite these common interests, seasonal employees do not share a community of interest sufficient to warrant their eligibility.

Varsity's employees are derived from a large labor market and randomly hired. Though one employee, Kassandra Barksdale, testified that a supervisor asked her to return to Varsity, Varsity does not maintain a recall list and has no policy of recalling former employees. The dispositive factor, however, is the lack of regularity in seasonal employment. Over the past three years, not more than 10 percent of seasonal employees was employed the prior season. And not more than 13 percent was offered permanent employment. The number of permanent carry-overs for the current year is not clearly indicated by the record. However, in neither of the preceding two years did the combined percentage of returnees and carryover employees exceed 19 percent. Therefore, I find that Varsity does not have a stabilized demand for, and dependence on a substantial number of regular employees. Consequently, I find that there is not enough regular seasonal employment or chance of becoming permanent to give Varsity's seasonal employees a sufficient community of interest with permanent employees. I shall therefore exclude them from the unit.

Clericals

Petitioner and Varsity disagree as to the classification of four clerical employees. The Petitioner maintains that Pam Beasley, Regina Jones, and Marcy Hamblen are office clericals and that Makala Freeman is a warehouse clerical. Varsity asserts the contrary.

Warehouse manager Hart offered undisputed testimony concerning Marcy Hamblen. Marcy Hamblen's job is largely the same position as Brenda Blaylock. Blaylock has been stipulated a warehouse clerical employee. Hamblen takes the paperwork from Pam Beasley that involves rush orders, goes into the warehouse and pulls the merchandise. She also corrects existing orders. She and Blaylock are on the floor 75 percent of the time and the other 25 percent they are in the office filing or scanning barcodes. She punches a time clock, is paid hourly, uses the same cafeteria and parking area as all warehouse employees.

The next disputed clerical is Makala Freeman who handles the returned orders on the Umbro side. This is the same job as that held by Anne King, who does returns on the Varsity side of the warehouse. Anne King has been stipulated an office clerical employee. All of Varsity's returns are coordinated through the corporate offices; therefore, Freeman and King report to Betty Joyner at the Horizon Lakes facility. It was estimated that they both spend 10 to 15 percent of their time on the warehouse floor. Petitioner did not offer any evidence concerning Makala Freeman.

The final clericals in dispute are Pam Beasley and Regina Jones. Pam Beasley is a coordinator between warehouse and customer service for the exception orders. She works exclusively on the Varsity line of apparel. Regina Jones does largely the same job on the Umbro side of the warehouse. Warehouse manager Hart testified that Beasley processes exceptional orders or orders that have mistakenly slipped through normal processing procedures. She receives the exception orders from customer service and then passes them out to Marcy Hamblen and Brenda Blaylock, who pull the merchandise for shipping. Her duties include entering the warehouse to track down orders, help to locate merchandise, and insure that orders go out. She reports back to customer service when the exception order has been filled. When Beasley makes pick-ticket changes, she takes the changes from computer print-out and then gives it to Hamblen or Blaylock, or goes onto the floor and makes the changes to the existing order herself. Both Jones and Beasley report directly to assistant warehouse manager Tommy Grissom. Beasley and Jones both punch a time clock, are paid hourly, use the same cafeteria and parking area as all warehouse employees.

There is dispute about how much time Beasley and Jones spend on the warehouse floor. Varsity estimated this time to be about 50 percent. Petitioner's witnesses testified that Beasley was only seen on the warehouse floor a couple times a week and that Jones was seldom seen. Regina Jones does have the additional duty of downloading data from some of the scanning guns. This duty is different from Beasley because the bar codes are only used on the Umbro side of the warehouse in order to maintain inventory. Warehouse employees scan in the bar codes on inventory when it is shipped, received, or stored. They take it to Jones who downloads it daily.

As a general rule, office clerical and plant clerical employees are not joined in a single unit. *Kroger Co.*, 204 NLRB 1055 (1973); *L.M. Berry & Co.*, 198 NLRB 217 (1972). The distinction between office and plant clericals is based on the employee's role in the production process and is grounded in the community of interests concept. *Martin Outdoor Advertising Co.*, 198 NLRB 1136, 1137 (1972); *Cook Composites & Polymers Co.*, 313 NLRB 1105 (1994). Warehouse-type integrated operations are a difficult area for defining proper units. Customarily, separate units of office clerical employees alone and plant clerical employees alone are appropriate. *Carling Brewing Co.*, 126 NLRB 347 (1960). There are exceptions to the general rule of excluding office clericals from the warehouse unit. An employee is not necessarily excluded from a warehouse unit simply because the employee works in an office setting and utilizes traditional office equipment. *S & S Parts Distributors Warehouse*, 277 NLRB 1293 (1985); *Avon Products*, 250 NLRB 1479, 1486 (1980). The Board has found a number of factors that create overriding common interests between office and warehouse employees that warrant their inclusion into a single warehouse unit.

In *Hamilton Halter Co.*, 270 NLRB 331 (1984) disputed employees spent 70 to 95 percent of their working time in their office processing customer orders and typing them onto invoice slips. They spent their remaining time working in the warehouse. Noting that these employees share characteristics with both office and warehouse

employees, the Board found them more akin to plant clericals because their primary role was to initiate production. However, it was highly relevant that the office employees had substantial interchange with production employees with 5 to 30 percent of her time spent on the warehouse floor.

In *John Hansen Co.*, 293 NLRB 63 (1989) the Board found the inclusion of an office employee proper where her duties involved preparing picking tickets for shipping merchandise. The employee also obtained and provided routing information to warehouse employees, shipped merchandise overseas, traced lost merchandise, and prepared COD's. By initiating warehouse production, the Board characterized her duties as integral to the functioning of Varsity's warehouse. In addition to initiating such production, the Board noted her frequent face-to-face contact with warehouse employees. In *ABS Co.*, 299 NLRB 516 (1990) the Board found an order entry clerk to have a requisite community of interest with warehouse clericals, despite the fact she worked in the office and had virtually no contact with production employees. The employee's duties included opening mail orders, sorting, and batching them into work units. The factors suggesting a common interest included common supervision with the warehouse employees, limited contact with stipulated office employees, and her role in the production process. The Board characterized her initiation of work orders as playing an integral role in the actual production process.

Initiating the production process is clearly a factor that indicates inclusion. However, standing alone, the role in production may not be enough to meet the community of interest standard. In *Esco Co.*, 298 NLRB 837 (1990). The Board found office clericals inappropriate members of a warehouse unit where the employees received orders from the company's main office and initiated warehouse production. The office employees lacked a common interest with the unit because they rarely entered the warehouse and had no interchange or substantial contact with unit employees. The office clericals also reported directly to a higher level supervisor than warehouse employees.

In *Conchemco Inc.*, 182 NLRB 125 (1970), there were three disputed clericals. Two were included with the warehouse unit because they initiated production by making out production tickets and calculating production after orders were completed. The employees also had a common supervision with the warehouse unit. However, the third employee was identified as being more like an office clerical and excluded from the unit, though her duties involved maintaining an inventory of raw materials, arguably playing a role in production. Exclusion was based on the employee working near the general office completely separated from production employees, separate supervision, limited time spent in the warehouse, and minimal contact with production employees.

The cases above illustrate the standard by which office employees may be included in the warehouse unit. In order to warrant inclusion, the employee must be participating in the process of production, even if it is the initial steps in the process. However, the more removed from the warehouse floor, the more secondary factors, in conjunction with the production role, are necessary to find a community of interest between the employee and the unit.

I find that Marcy Hamblen spends the majority of her time on the warehouse floor with substantially similar duties as the majority of the warehouse production employees. In fact, she does the same job as Brenda Blaylock who has been stipulated a warehouse clerical. Her primary duties are in the warehouse and I find that Hamblen is a warehouse clerical having the same community of interests as any other warehouse employee. Accordingly, I shall include her in the warehouse unit should the Board direct an election.

With regard to Makala Freeman, I find that her duties at the warehouse are different than that of any other employee except Anne King, who has been stipulated to be an office clerical. Freeman and King do the same job and should be classified accordingly. Freeman spends very little time on the warehouse floor and in fact reports to different supervision than any employees in the warehouse unit. I find that Freeman is involved with customer services more than production. I find that the facts surrounding Freeman are analogous to *Conchemco Inc.*, supra, and warrant her exclusion from the bargaining unit. Except for limited interaction with warehouse employees, the record shows a weak community of interest between Freeman and the production unit.

Pam Beasley and Regina Jones have very similar job duties. They both take orders and begin the processing of orders. As a result, I find that both employees occupy an initial position in the production process and are functionally integrated with the warehousing process.

I also find that there are a number of secondary factors that demonstrate common interests between these employees and the warehouse units. First, both Beasley and Jones have the same supervisor and enjoy the same terms of employment as those of the warehouse employees. Second, there is substantial interchange between the warehouse unit and Beasley and Jones. Beasley works closely with warehouse employees Brenda Blaylock and Marcy Hamblen in coordinating the packing and shipping of exception orders. Beasley also works on the warehouse floor pulling and tracking orders. I find these duties to be those of a warehouse clerical and not an office clerical. The record is silent as to how Jones fills her exception orders. However, since she is doing the same job as Beasley it is presumed that she is either working directly with pullers and packers, or she is filling them herself. Regardless of how she actually fills the orders, there would be interaction with warehouse employees. Jones also works with warehouse personnel while collecting bar code data which she downloads into the computer. Managing the bar code data is a necessary process of inventory management more akin to warehouse clerical duties.

I find that Beasley and Jones play an active and integral role in the warehouse process, substantially interacting with warehouse employees, and enjoying the same terms of employment. Consequently, they share a strong community of interest with the warehouse unit and should be included in the unit.

Driver

The parties disagree as to the voting eligibility of Marcus Haynes. The Petitioner takes the position that Haynes is not a member of the unit, while Varsity takes the position that Haynes shares common interests with the voting unit and should be included.

Haynes is a courier who has been employed at Varsity over six years. He clocks in and out at the Horizon Lakes facility, in Memphis, Tennessee, where he picks up the company van. His duties are that of a courier: driving between Horizon Lakes and Olive Branch, taking product to contractors, and driving to the post office. However, Haynes reports to the Olive Branch facility and is paid from the Olive Branch budget. Warehouse manager Hart testified that he was Haynes' supervisor and that Haynes' lead person was Tyrone Metcalf. When Haynes completes his daily courier duties or when it is slow during the off-season, he does a number of fill-in jobs in the warehouse. He is paid hourly, uses the same cafeteria and break area as all warehouse employees. Haynes does come in a little later in the morning than other employees due to a second job.

The community of interest test applies to dual-function employees. *Wilson Engraving Co.*, 252 NLRB 333 (1980). Employees who perform more than one function for the same employer may vote, even though they spend less than a majority of their time on unit work, if they regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit. *Ansted Center*, 326 NLRB 1208 (1998).

Haynes has a substantial and common interest in the working conditions in the Olive Branch warehouse due to common supervision, compensation, and his daily work schedule at the Olive Branch warehouse. He also receives the same benefits of employment as the permanent employees. He has a community of interest with the Olive Branch warehouse employees and I find that he is an eligible participant in the voting unit.

Tyrone Metcalf

The parties disagree as to the voting eligibility of Tyrone Metcalf. Varsity takes the position that Metcalf is one of several lead people in its warehouse and that he has limited authority, not meeting the definition of supervisor under the Act. It is the Petitioner's position that Metcalf has more authority and discretion than other lead people do and that he is a supervisor within the meaning of Section 2(11).

Warehouse manager Hart testified that Metcalf is the lead person for shipping & receiving. It is Metcalf's duty to make sure that merchandise and raw goods are unloaded from trucks and that merchandise is shipped. During the high point of the season he will be leading seven or eight people in assuring the completion of his duties. Metcalf has a desk in the shipping & receiving area in order to work with freight companies and

schedule deliveries. This area is completely separate from the main office and is partitioned-off from the shipping & receiving area.

Hart maintains that Metcalf has no final authority to hire, fire, discipline, or use independent discretion. He testified that there are a total of six lead employees of whom none have the authority to hire or fire other employees. They are paid hourly, sit in on hiring, occasionally attend managerial meetings; but, nevertheless lack authority to discipline employees and are required to consult management regarding all decisions. Hart stated that he conducts an independent investigation of all matters reported by leads. Hart testified that Metcalf attends managerial meetings, but has not attended all managerial meetings. He noted, however, that lead people do attend these meetings where the topic concerns their area of the warehouse. When asked whether Metcalf has any more authority than other lead people, Hart responded, “no, not really.”

Metcalf serves as the temporary plant supervisor when other supervisors are not in the plant. This includes supervising those employees outside the shipping & receiving department. Cassandra Barksdale and Telisse Raines testified that they were told, by supervisor Chris Long, that Metcalf was their supervisor when Long was not around. Metcalf does have the authority to release people from work early, without prior approval from a superior. Hart also stated that Metcalf has input on employee evaluations. When asked if Metcalf had ever effectively recommended that somebody be hired or fired, Hart stated, “I would say so,” but he could not remember a specific example. Petitioner produced a copy of Metcalf’s business card, which stated that he was the shipping & receiving supervisor at Varsity. Hart admitted that Metcalf had been a supervisor in the past; however, he stated that Metcalf asked to be demoted, over a year ago, in order to take a second job.

Employee Carl Hall testified that Metcalf interviewed him in January 2000. He stated that Metcalf conducted the interview alone and later telephoned Hall at his home offering him a position with Varsity. Hall testified that he never spoke to anyone but Metcalf prior to his being hired. Metcalf also met with Hall on July 31 and confirmed that Hall would be laid off on August 4, 2000. On that same day, Cassandra Barksdale testified that Metcalf gave her a business card, which stated that he was the shipping & receiving supervisor. Both Barksdale and Charlotte Payne testified that Metcalf had supervised them when Chris Long was out of the warehouse. Telisse Raines testified that Metcalf held himself out to the employees as a supervisor. During his employment with Varsity, Hall was under the impression that he was working for Metcalf.

Indicia of supervisory authority are specified in Section 2(11) of the Act. Under Section 2(11) of the Act, a supervisor is “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action....” Possession of any one of these indicia is sufficient to confer such status upon an employee. *Allen Services Co.*, 314 NLRB 1060, 1061 (1994); *N.L.R.B. v. Edward G. Budd Mfg. Co.*, 169 F.2d 437 (6th Cir. 1948). However, authority alone does not equate the status. The authority must be

exercised with independent judgment on behalf of management, and not merely by routine. *Juniper Industries*, 311 NLRB 109, 110 (1993); *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). If supervisory authority is exercised in a routine, clerical, perfunctory, or sporadic manner, then supervisory status is not conferred on an employee. *Allen Services Co.*, supra; *Browne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). Employees who are merely conduits for relaying management information to other employees are not supervisors. *Bowne of Houston, Inc.*, supra. The Board will not consider titles alone to be determinative of supervisory status. *Marukyo U.S.A., Inc.*, 268 NLRB 1102 (1984). Further, the burden of providing evidence of supervisory status rests on the party asserting that such status exists. *S.S. Joachim & Anne Residence*, 314 NLRB 1191, 1194 (1994); *Northcrest Nursing Home*, 313 NLRB 491, 496 fn. 26 (1993); *Bowne of Houston, Inc.*, supra.

The record indicates that Metcalf is a supervisor as defined by section 2(11) of the Act. The record contains at least two indicia of Metcalf's supervisory status. First, Metcalf effectively recommended the hiring of Carl Hall. Metcalf conducted Hall's interview and then offered him the position with Varsity. No other person from Varsity interviewed or spoke with Hall, prior to his being hired. It is possible that Metcalf met with management concerning Hall prior to his employment; however, there would still be considerable reliance on Metcalf's independent judgement. At a minimum, such activity amounts to an effective recommendation to hire under the Act. While Hart indicated that Metcalf did not make independent decisions and that any such recommendations by Metcalf were followed by an independent investigation by management, this certainly was not the case concerning Carl Hall. If any investigation was conducted it was so limited as to rely completely on the independent discretion of Metcalf. Even warehouse manager Hart indicated that, in the past, Metcalf had effectively recommended hiring and firing of other employees. As a result, Metcalf made an effective recommendation to hire under the Act.

Another primary indicium of Metcalf's supervisory status is his allowing workers to punch-out early and leave the warehouse, without referring to a higher authority. Whether or not Metcalf reports such decisions to his supervisor, he exercises independent authority and judgement in evaluating the needs of the entire warehouse. Consequently, Metcalf authority is primary indicium of supervisory status.

I find numerous secondary indicia of supervisory status in the present case. Metcalf held himself out to be a supervisor and even distributed company cards that stated he was a supervisor. Chris Long also held Metcalf out to be a supervisor to warehouse employees that were not in the shipping and receiving department. Metcalf regularly attended managerial meetings and temporarily watched over the warehouse when regular supervisors are unavailable. Metcalf was temporary supervisor when permanent supervisors were not on the warehouse floor. When serving in this capacity he supervised the entire warehouse, not just shipping & receiving employees. These indicia further bolster a finding that Metcalf is a supervisor under the Act.

In its brief, Varsity asserts Metcalf is not a supervisor because any authority exercised by Metcalf was isolated or sporadic and his direction of employees was routine in nature, both factors consistent with a non-supervisory lead person. *Sears, Roebuck And Co.*, 292 NLRB 753 (1991). I disagree with Varsity for two reasons. First, the hiring process involves non-routine evaluations of an employee and that employee's ability to satisfy the company's needs. The Board has found that employees can conduct routine initial interviews where a supervisor conducts a follow-up investigation by conducting a subsequent interview. *Coors Distributing Co. of San Jose, Inc.*, 283 NLRB 328 (1987). However, as the record indicates, there was no follow-up interview with Hall. Therefore, the company relied on the independent judgement of Metcalf. Second, the authority to dismiss employees from their scheduled working hours is anything but routine. It represents a high level of authority. The Board has found that lead persons can allow employees to leave work during personal emergencies, but distinguishes this authority from the authority to send employees home for other reasons. *Chrome Deposit Corp.*, 323 NLRB 961 (1997). This is particularly noteworthy because Metcalf can dismiss employees that are not even within the shipping and receiving department. This is a personnel decision that requires evaluating the needs of the entire warehouse and then the authority to implement his independent decision.

I find that Metcalf exercised the duties of a supervisor. I find two primary indicia of supervisory status including the power to effectively recommend hiring and to direct employees. I find that he exercised such authority through independent judgement. I also find numerous secondary indicia of his supervisory status. Accordingly, I find that Metcalf is a supervisor within the meaning of the Act and is excluded from the warehouse unit.

Conclusion

In conclusion I dismiss the petition due to the imminent relocation of the Varsity warehouse. Upon review of this decision, I find the warehouse unit should not include seasonal employees. I further find Pam Beasley, Marcy Hamblen, and Regina Jones warehouse clericals included in the unit; Makala Freeman an office clerical and excluded; and driver Marcus Haynes included. Finally, I find that Tyrone Metcalf is a supervisor and excluded from the unit.

Should an election be directed, the appropriate unit is as follows:

INCLUDED: All full-time and part-time production and maintenance employees, including pullers, packers, order-stockers, shipping and receiving, warehouse clericals and driver, employed at the Employer's Olive Branch, Mississippi facility.

EXCLUDED: All seasonal employees, office clericals, guards and supervisors as defined in the Act.

There are approximately 27 employees in the above described unit.

CLASSIFICATION INDEX

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347-1050-1767-0000
362-6724
177-2466-0000-0000
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177-8520-0000-0000
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177-1600-0000-0000
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